Supreme Court, U.S.
FILED

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No. _____

In The

Supreme Court of the United States

October Term, 1994

JOHN EDWARD JONES,

Petitioner,

v.

STATE OF ALABAMA,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of The State Of Alabama

PETITION FOR A WRIT OF CERTIORARI

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34 pp

QUESTION PRESENTED

I. Whether a police officer, when relying on false statements of material fact made by a confidential informant who could not have physically made the observations in question to obtain a search warrant, acts with "reckless disregard for the truth" as defined by *Franks v. Delaware*, 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978).

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OPINIONS BELOW

The Order of the Supreme Court of the State of Alabama denying Petitioner's Petition for Writ of Certiorari to the Alabama Court of Criminal Appeals, Case No. SC 1940082, is reprinted in the Appendix to the Petition, at App. 1. The Order of the Alabama Court of Criminal Appeals denying Petitioner's Application for Rehearing and Rule 39(k) Motion, Case No. CR 93-0672, is reprinted in the Appendix of this Petition, at App. 2. The Memorandum Opinion of the Alabama Court of Criminal Appeals affirming the order of the trial court denying Petitioner's Motion to Suppress, Case No. CR 93-0672, is reprinted in the Appendix of this Petition, at App. 3-4. The order of the trial court denying Petitioner's Motion to Suppress is reprinted in the Appendix of this Petition, at App. 5-18.

JURISDICTION

The Certificate of Judgment of the Supreme Court of the State of Alabama (App. 1) was entered on January 6, 1995. The jurisdiction of the Supreme Court is invoked pursuant to 28 U.S.C. § 1257(a). This petition for certiorari is being docketed within 90 days of the date of the judgment being appealed from, as required by 28 U.S.C. § 2101(c).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution

Amendment IV (1791)

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oaths or affirmations, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment XIV (1868)

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

(1) Court Proceedings and Disposition in Courts Below:

Procedurally, the instant case comes before this Court as a result of the denial of Petitioner's Petition for Writ of Certiorari by the Supreme Court of the State of Alabama on the 6th day of January, 1995.

The Petitioner, John Edward Jones, was arrested in Tuscaloosa, Alabama, by agents of the West Alabama Narcotics Squad and the Alabama Bureau of Investigation on May 29, 1991. After a search of the vehicle that he was driving, Petitioner was charged with Trafficking in Cocaine, in an amount in excess of one kilogram but not in excess of ten kilograms, pursuant to § 13A-12-231(2)(b) of the *Code of Alabama* 1975. Petitioner was indicted by the Grand Jury of Tuscaloosa County on November 18, 1991; Petitioner filed a Motion to Suppress based on false assertions of fact contained in the affidavit supporting the search warrant in question on May 12, 1992, which was submitted to the trial court for the Sixth Judicial Circuit on factual stipulations. Petitioner's Motion to Suppress raised the issue of whether the police officer who attested to the affidavit acted with "reckless disregard" for the truth or falsity of the facts asserted, in violation of the Fourth Amendment to the U.S. Constitution and this Court's previous ruling in *Franks v. Delaware*, 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978). Thus, Petitioner injected a federal question involving the interpretation of the Fourth Amendment into the proceedings of the trial court (App. 5-18), which also proved to be the focal point of the subsequent review by the Alabama Court of Criminal Appeals (App. 3-4).

The trial court entered an order denying Petitioner's Motion to Suppress on the 26th day of October, 1993, and Petitioner was sentenced to a term of fifteen years, including a minimum mandatory sentence of five calendar years to serve, on January 7, 1994. Petitioner gave notice of appeal at the conclusion of that hearing.

The Alabama Court of Criminal Appeals affirmed the ruling of the trial court in a Memorandum Opinion issued

on August 19, 1994; the Court of Appeals also overruled Petitioner's Application for Rehearing on September 30, 1994. The Supreme Court of the State of Alabama issued a Certificate of Judgment denying Petitioner's Petition for Writ of Certiorari on the 6th day of January, 1995.

(2) Statement of Facts:

On or about the 29th day of May, 1991, Agent Paul Johnson of the Alabama Bureau of Investigation set up a surveillance operation in the area of the Quality Inn located in Tuscaloosa, Alabama, based on information he had received from an informant named Bobby Fields. Agent Johnson had been informed by Fields that an automobile would arrive at the Quality Inn in the late afternoon; the automobile in question would bear Illinois license plates and contain a quantity of cocaine. Agent Johnson was also given a description of the appearance of the vehicle and the two persons that would be arriving in it. The vehicle was driven by Petitioner, John Edward Jones.

Agent Johnson received this information from Fields in a telephone call that took place approximately 7:15 p.m. Agent Johnson did not go to the Quality Inn himself until after the vehicle had been identified by other officers on the scene and he had obtained a search warrant for both the vehicle and the motel room occupied by the two individuals. The search warrant was executed at approximately 10:20 p.m.

The search warrant was obtained by Agent Johnson based on his affidavit, which stated in pertinent part that

the confidential informant, referring to Bobby Fields, had personally observed cocaine in the vehicle within forty-eight hours of the signing of the affidavit. A search was performed on the motel room and the person of Petitioner, but no controlled substances were found. Officers then searched the interior of the vehicle, which Petitioner stated was registered in his wife's name; the officers discovered three kilograms of cocaine concealed inside the speaker well of the vehicle. To find the cocaine, they had to open the trunk and remove the rear speaker mounts.

Bobby Fields later testified at the trial of another person charged in this incident, identified himself as the confidential informant relied on by Agent Johnson, and stated that he had contacted Agent Johnson and set up the search and arrest of Petitioner. Fields arranged for Petitioner to transport the cocaine to Tuscaloosa, and rented the motel room at which they were to meet. Fields had set up this transaction through telephone conversations, and had himself arrived at the Quality Inn from another state at approximately 1:00 p.m. on May 29, 1991. After he arrived, Fields called Agent Johnson to advise him of the arrival of Petitioner. At no time prior to the search of Petitioner's vehicle did Bobby Fields personally observe any controlled substance in Petitioner's vehicle.

The information given to Agent Johnson by Bobby Fields contained a description of the vehicle in question sufficient for law enforcement officers to recognize it when it arrived, along with a rough estimate of the time at which it would arrive in Tuscaloosa. Fields lied when telling Agent Johnson that he had personally observed cocaine in that particular vehicle within forty-eight hours

of the time at which the affidavit for the search warrant was actually signed. The affidavit is silent regarding the essential questions of where, when and how this "observation" was actually made; Bobby Fields did not give Agent Johnson any further details regarding his knowledge or involvement in this transaction, and Agent Johnson apparently never asked for any other specific information.

ARGUMENT

Rule 10 of the Revised Rules of the Supreme Court of the United States provides, in part, that a Petition for a Writ of Certiorari may be granted when a state court has decided a federal question in a way that conflicts with applicable prior decisions of this Court. Petitioner contends that the appellate courts of the State of Alabama have failed to follow the definition of "reckless disregard" in the context of false information included in an affidavit made the basis for a search warrant, as set forth by this Court in *Franks v. Delaware*, 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978). The trial and appellate courts have failed to review the instant case in light of the facts presented and applicable case precedent, and have thus erred in their prior rulings; Petitioner seeks to invoke the jurisdiction of this Court and obtain a Writ of Certiorari as a means to redress this injustice.

Franks established the means by which a criminal defendant may challenge the factual assertions contained in a supporting affidavit for a search warrant. First and foremost, the defendant must make a showing that a

material assertion contained in the affidavit is indeed false. If such a false statement exists, "[t]here must be allegations of deliberate falsehood or of reckless disregard for the truth, and these allegations must be accompanied by an offer of proof." Finally, should a false statement exist and be shown to have been included deliberately or with reckless disregard for the truth, it must be stricken from the affidavit. If the remaining affidavit is insufficient to establish probable cause for a search, the warrant itself must be voided and the fruits of the search excluded. *Id.*, at 438 U.S. 171-72; 98 S.Ct. at 2676. *See also Moore v. State*, 570 So.2d 788 (Ala.Crim.App. 1990); *Villemez v. State*, 555 So.2d 342 (Ala.Crim.App. 1989); *Gray v. State*, 507 So.2d 1026 (Ala.Crim.App. 1987).

Two requirements of the analysis set forth in *Franks* are uncontroverted and are made very clear by the facts presented. First, the most essential fact stated in Agent Johnson's affidavit was the assertion that the informant, Bobby Fields, had personally observed cocaine in the vehicle driven by Petitioner. This is the only mention of any controlled substance in the affidavit, and deletion of this assertion would prevent the affidavit from setting out probable cause for the issuance of the search warrant. As a result, the warrant is due to be voided and the fruits of the subsequent search suppressed. Second, there must be a showing that a material statement contained in the affidavit is indeed false. That facet of the analysis is also clear in the record, because, while testifying at the trial of another person charged in the same incident as Petitioner, Bobby Fields acknowledged his role as the confidential informant in this case. He further testified that he never

personally observed any controlled substance in the possession of Petitioner or in the vehicle driven by him. In sum, the statement at issue in the instant case is false, and the deletion of that statement from the affidavit would require that the search warrant be voided.

Therefore, the sole issue presented in the instant case is an issue that involves the interpretation of a prior decision of this Court, and provides the basis for this Petition for Writ of Certiorari. The search warrant involved is due to be suppressed in the event that Petitioner makes a showing that the statement regarding the observation of a controlled substance was made with reckless disregard for its truth or falsity on the part of Agent Johnson. The definition of "reckless disregard" by the appellate courts of the several states has proved to be a thorny problem, as acknowledged by the Alabama Court of Criminal Appeals in *Sims v. State*, 587 So.2d 1274 (Ala.Crim.App. 1991). "We know what intentional lies are, but the meaning of 'reckless disregard for the truth' is not self-evident." *Id.*, at 1275, quoting *United States v. Williams*, 737 F.2d 594, 602 (7th Cir. 1984); *cert. denied*, 470 U.S. 1003, 105 S.Ct. 1354, 84 L.Ed.2d 377 (1985). An affiant acts with reckless disregard for the truth of a statement when he "in fact entertains serious doubts as to the truth of his allegations . . . Reckless disregard for the truth may also be proved inferentially from circumstances evincing obvious reasons to doubt the veracity of the allegations." *Id.*, at 1275, quoting *United States v. A Residence Located at 218 Third Street*, 805 F.2d 256, 258 (7th Cir. 1986). "Reckless disregard" is a term that must be defined in light of

the totality of the surrounding circumstances. *Illinois v. Gates*, 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983).

The facts of the instant case reveal a reckless disregard on the part of Agent Johnson regarding the truth or falsity of the information given to him by confidential informant Bobby Fields. Agent Johnson received the information regarding Petitioner and the vehicle he was traveling in at approximately 7:15 p.m. on the evening of May 29, 1991. Fields had himself arrived in Tuscaloosa from another state earlier that afternoon and rented the motel room at which he was to meet Petitioner. All arrangements for this meeting were made by means of the telephone. After receiving the call from Fields, Agent Johnson set up surveillance of the motel; police officers also had the vehicle Petitioner was traveling in under surveillance from the time it reached Tuscaloosa until the time of the actual search and arrest of Petitioner. Prior to the search of the vehicle, no controlled substances were observed and Fields did not have access to the trunk of the vehicle driven by Petitioner. When the search was conducted at approximately 10:20 p.m., the cocaine was concealed to the extent that officers had to open the trunk and remove the rear speaker mounts to extract the cocaine.

Agent Johnson was aware of the time frame in which this transaction was to take place, and he knew that both Petitioner and Bobby Fields were coming to Tuscaloosa from different states. Agent Johnson also placed the vehicle under surveillance from the time it entered Tuscaloosa until it was searched, so he was well aware that no one had an opportunity to examine the contents of the trunk. Further, Agent Johnson had been contacted by Fields and

given the information contained in the affidavit before Petitioner's vehicle had entered Tuscaloosa. No evidence has ever been presented to show that Agent Johnson ever asked Fields a single question regarding how, when or where his "observations" had actually taken place.

"The veracity of the assertions supporting probable cause is integral to the criminal justice system." *United States v. Cortina*, 630 F.2d 1207, 1213 (7th Cir. 1980). The information given to Agent Johnson from the informant Bobby Fields, along with the objective facts about the transaction known personally to Agent Johnson, would create grave misgivings in the mind of any disinterested observer as to how the "observations" related by Fields were physically possible. In addition to scenarios in which a police officer intentionally lies or conceals detrimental information in order to obtain a search warrant, this Court's holding in *Franks* certainly contemplates a police officer who turns a blind eye to obvious reasons to doubt the veracity of what he has been told by an informant. In addition, it must be stressed that the false assertions at issue are the entire basis for the police officer's belief that a crime was being committed. The courts of Alabama have previously interpreted *Franks* in a manner that recognized the crucial importance of the informant's actual observation of the controlled substance at issue. In *Vincent v. State*, 607 So.2d 1290 (Ala.Crim.App. 1992), the Alabama Court of Criminal Appeals held that, where the informant's assertion that he had actually observed a controlled substance was later shown to be false, the falsity of that statement would "no doubt" lead to the voiding of the search warrant pursuant to *Franks*. *Id.*, at 1296.

Confidential informant Bobby Fields never had an opportunity to physically make the observations that he related to Agent Johnson in the instant case. At a later hearing under oath, Fields testified that he had never seen any controlled substance in Petitioner's possession, and had certainly not seen any within the forty-eight hour time frame provided by the affidavit. Agent Johnson was aware, prior to the drafting of the affidavit and the signing of the search warrant, that Fields never had an opportunity to look into Petitioner's vehicle or otherwise make the observation relied on in the affidavit prior to Petitioner's arrival in Tuscaloosa. Further, Petitioner was under surveillance from the time he arrived until the actual search, so Agent Johnson also knew that there was no opportunity for Fields to make his observation after Petitioner had arrived in Tuscaloosa. To accept information that is physically impossible on its face without further investigation, or without even asking a question, and then use that information to obtain a search warrant is clearly reckless disregard for the truth on the part of the officer obtaining the affidavit. The failure of the courts of Alabama to acknowledge this is abhorrent to the Fourth Amendment, and is in direct conflict with the mandates of this Court.

CONCLUSION

For these reasons, this Court should grant this Petition for Writ of Certiorari.

Respectfully submitted this the 3rd day of April, 1995.

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Counsel for Petitioner

IN THE SUPREME COURT OF ALABAMA

January 6, 1995

1940082

Ex parte John Edward Jones. PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS (In re: John Edward Jones v. State) (93-672) (Tuscaloosa: CC-91-1895)

CERTIFICATE OF JUDGMENT
Writ Denied

The above cause having been duly submitted, IT IS CONSIDERED AND ORDERED that the petition for writ of certiorari is denied.

COSTS TAXED TO PETITIONER.

KENNEDY, J. – Hornsby, CJ., Almon, Houston and Cook, JJ., concur.

I, Robert G. Esdale, as Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true and correct copy of the instrument(s) herewith set out as same appear(s) of record in said Court.

Witness my hand this 6 day of Jan 1995

/s/ Robert Esdale

Clerk, Supreme Court of Alabama

COURT OF CRIMINAL APPEALS

STATE OF ALABAMA
JUDICIAL BUILDING, 300 DEXTER AVENUE
P.O. BOX 301555
MONTGOMERY, AL 36130-1555

WILLIAM M. BOWEN, JR.
Presiding Judge
SAM TAYLOR
JOHN PATTERSON
H. WARD McMILLAN
MARK G. MONTIEL
Judges

Office of the Clerk
(205) 242-4590

Court of Criminal Appeals No. 93-0672
(Tuscaloosa Circuit Court No. CC-91-1895)

John Edward Jones Appellant **vs.** **State of Alabama** Appellee

Dear Sir or Madam:

You are hereby notified that on **September 30, 1994,** the following indicated action was taken in the above-styled cause by the Court of Criminal Appeals of Alabama:

Application for rehearing **overruled.** Rule 39(k) motion **denied.**

LANE MANN
CLERK
COURT OF CRIMINAL APPEALS

Andrew Smith
2820 7th Street
P.O. Box 031702
Tuscaloosa, AL 35401

Court of Criminal Appeals

State of Alabama
Judicial Building, 300 Dexter Avenue
P.O. Box 301555
Montgomery, AL 36130-1555

WILLIAM M. BOWEN, JR.
Presiding Judge
SAM TAYLOR
JOHN PATTERSON
H. WARD McMILLAN
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Judges

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MEMORANDUM

CR 93-0672 Tuscaloosa Circuit Court No. 91-1895

John Edward Jones, alias v. State

Affirmed by memorandum. The appellant's conviction for trafficking in cocaine is due to be affirmed. The trial court did not err in denying the appellant's motion to suppress evidence obtained from the search of his car. This issue hinges not on whether the confidential informant told the truth when talking to Agent Johnson, but whether Johnson's statements in the affidavit were knowingly and intentionally made falsely, or with reckless disregard for the truth. *Franks v. Delaware*, 438 U.S. 154, 93 S.Ct. 2674, 57 L. Ed. 2d 667 (1978). Reckless disregard has been defined as follows.

> "An affiant acts with 'reckless disregard for the truth where he " 'in fact entertained serious doubts as to the truth of his" allegations.' Reckless disregard for the truth may also be proved inferentially 'from circumstances evincing "obvious reasons to doubt the veracity" of the

> allegations.' " *United States v. A Residence Located at 218 Third Street,* 805 F.2d 256, 258 (7th Cir. 1986). 'Because states of mind must be proved circumstantially, a factfinder may infer reckless disregard from circumstances evincing "obvious reasons to doubt the veracity" of the allegations.' [*United States v.*] *Williams,* 737 F. 2d [594 602 (7th Cir. 1984), cert. denied, 470 U.S. 1003, 105 S.Ct. 1354, 84 L.Ed. 2d 377 (1985)]."

Sims v. State, 587 So. 2d 1271, 1275 (A a. Crim. App. 1991).

The defendant bears the burden of establishing by a preponderance of the evidence that the affiant included the challenged statement knowingly and intentionally or with reckless disregard for the truth. *Franks v. Delaware,* 438 U.S. at 98 S.Ct. at 2676.

"A trial court's ruling on a motion to suppress 'is to be given great credence,' *Harper v. State,* 535 So. 2d 599, 601 (Ala. Crim. App. 1988), and 'will be upheld unless it is clearly erroneous or palpably wrong,' *State v. Phillips,* 517 So. 2d 648, 649 (Ala. Crim. App. 1987)." *State v. Washington,* 623 So. 2d 392, 400 (Ala. Crim. App. 1993).

Our review of the record shows that the record supports the trial court's finding that the appellant did not meet his burden in this case, and we cannot say the trial court's decision was clearly erroneous or palpably wrong. We hold that the trial court did not err in denying the appellant's motion to suppress evidence obtained in the search of his car.

All the Judges concur.

STATE OF ALABAMA,	)	IN THE CIRCUIT COURT
VS.	)	OF TUSCALOOSA
	)	COUNTY, ALABAMA
JOHN EDWARD JONES,	)	
DEFENDANTS.	)	CASE NO. CC-91-1895

ORDER DENYING MOTION TO SUPPRESS

(Filed Oct. 28, 1993)

This matter was submitted to the Court under special stipulations for the purpose of resolving the "Motion to Suppress" filed by the defendant on May 12, 1992. This case was originally handled by another Circuit Judge of this circuit, the Honorable John M. Karrh, and he scheduled said motion for hearing on several different occasions, but contained the same each time on motions of the defendant. Following Judge Karrh's retirement earlier this year, this case was reassigned to the undersigned, along with said pending motion to suppress.

The State, proceeding through Assistant District Attorney Ben M. Baxley, and the defendant, proceeding through one of his attorneys, Andrew A. Smith, have proposed that the undersigned "hear" and rule upon said motion on the basis of the contents of the court file, the "Memorandum in Support of Motion to Suppress" delivered by the defendants to the Court at some point within the last several months but not bearing a "filing stamp" of the Circuit Clerk and not being dated with respect to the "Certificate of Service" appended at its end, and the "State's Response to Defendant's Memorandum in Support of Motion to Suppress" filed on May 26, 1993, *including* the excerpts attached thereto of testimony given by Bobby Fields and Agent Paul Johnson at the trial of Jose

Corso, and the testimony of Agent Johnson at a preliminary hearing conducted in the instant case. The parties have stipulated to the Court that it may receive and rely upon said transcripts of testimony the same as if the respective witnesses had appeared and testified to identical effect before this Court.

The undersigned does not find within the court file a copy of the search warrant to which said motion is directed, or the affidavit of Agent Johnson alleged to have accompanied the same. The "Petition" which the defendant filed herein on November 25, 1992 states in Paragraph 2A of the same that a copy of said search warrant was attached as Exhibit A thereto, but none of the several copies of said petition contained in the court file have said search warrant annexed, and it is not otherwise present in the court file. The aforesaid "Memorandum in Support of Motion to Suppress" filed by the defendant does have attached thereto what purports to be a copy of said affidavit, but with the portions supposedly reciting information received from the confidential informant deleted by being "blacked out," i.e., per the closing paragraph of said memorandum, "A copy of the warrant with the offending portions blacked out is attached hereto." The essence of those deleted portions and the essence of said motion to suppress are succinctly stated in the second paragraph of the "Introduction" section of the defendant's said memorandum, to-wit:

> The basis of the defendant's Motion to Suppress is the false allegations contained in Johnson's Affidavit. Specifically, Johnson alleged that he received information from a reliable confidential informant who had "personally

> observed cocaine in the possession of John Jones inside the vehicle of John Jones . . . " Johnson further swore that the informant had personally observed this cocaine inside the vehicle within the forty-eight (48) hours preceding his signing of the Affidavit. Johnson knew, or should have known, that these allegations were false.

As acknowledged by both sides, the outcome of this case is controlled by the doctrine established in *Franks v. Delaware,* 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978). Therein the Supreme Court set forth rules and a procedure for determining when false information included within an affidavit would vitiate the search warrant issued in reliance on it, requiring as a threshold matter that "a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit." As the Court went on to emphasize later in its opinion, "[a]llegations of negligence or innocent mistake are insufficient."

Defendant asserts that the statement in Johnson's affidavit that the reliable confidential informant had "personally observed cocaine in the possession of John Jones inside the vehicle of John Jones . . . " within the past forty-eight hours was untrue based on testimony of that informant elicited at the Corzo trial. (For convenience, references to pages of the Corzo trial transcript will be referenced simply as "C.T.-" and references to the preliminary hearing conducted in here will be referenced simply as "P.H.-".) Agent Johnson has identified Bobby Fields as his confidential informant (C.T. 82, P.H. 101). Testifying at the Corzo trial, Fields was asked if Jones had ever shown the subject cocaine to him, and he answered

"No." He testified that Jones did tell him he had it with him, and that, as they were walking by Jones' car parked outside the Quality Inn Motel, Jones told him that the cocaine was located "in the back of the car under some speakers, in the back of the car . . . right there under the speakers." (C.T. 59). At no other point in Fields' testimony at the Corzo trial does he indicate that he ever actually saw the cocaine. Accordingly, at least for the purposes of this analysis, it will be taken as established that any assertion to Johnson by Fields that the latter had "personally observed cocaine in the possession of John Jones inside the vehicle of John Jones" was false when made. Under *Franks,* however, the pivotal inquiry is not whether Fields told the entire truth in connection with assertions he made to Johnson, but whether Johnson's own statements in his affidavit were knowingly and intentionally made falsely, or with reckless disregard for the truth. Significantly, at no point in the transcripts of Johnson's respective testimonies at the preliminary hearing and the trial of Corzo does he testify with regard to what he was told by Fields. That line of inquiry was cut off several times during the preliminary hearing under the rule protecting the identity of a confidential informant. But even at the Corzo trial Johnson was never questioned concerning what Fields had told him in that regard, and Johnson's testimony does not otherwise touch on that issue. Likewise, Fields was never questioned, and did not otherwise testify, concerning what he had told Johnson in that regard. Under these circumstances defense counsel forthrightly acknowledge in their said memorandum, "We do not know definitively the answer to the question, Did Fields lie to Johnson and tell

him that he had seen the cocaine even though he had not?" Defense counsel do assert that, "There is every reason to believe that Agent Johnson either intentionally misrepresented the information on the warrant, or, if Fields really did tell him that he had personally viewed the cocaine, then Johnson acted unreasonably in relying on that information because he knew full well that it could not be true." (Pp. 6-7). In the final analysis, defense counsel rely on the proposition that "it does not matter" that we don't know if Fields actually lied and told Johnson that he had seen the cocaine, because the evidence establishes "that Johnson exhibited at least reckless disregard for the truth." (P. 7). At [sic] to that proposition, defense counsel argue that "Agent Johnson's testimony at the preliminary hearing conclusively demonstrates his reckless disregard for the truth in alleging that Fields had personally seen the cocaine," because Jones did not arrive at the Quality Inn until the evening of the day in question meaning that there was "no opportunity for Fields to view the cocaine prior to Jones' arrival," whereas "Johnson got the information for his affidavit from Fields prior to Jones's arrival." Consequently, according to the argument of defense counsel, Johnson would have known at the time he gave his affidavit in support of the warrant, that Fields would have had no opportunity personally to view the cocaine inside the vehicle, inasmuch as the vehicle had not yet arrived.

In the final analysis, the success of this argument hinges upon the alleged key proposition that "Johnson got [all] the information for his affidavit from Fields prior to Jones's arrival." This being a pivotal point in defense counsels' position, the Court has undertaken carefully to

read and "cross-reference" the entire of said transcripts, with the results hereinafter set forth. As to those results, the Court applies the "reckless disregard for the truth" prong of the two-pronged *Franks* test. In *Sims v. State*, 587 So.2d 1271 (Ala. Crim. App. 1991), the Court quoted definitions of that term from several sources, to-wit:

> "We know what intentional lies are, but the meaning of 'reckless disregard for the truth' is not self-evident. . . . " *United States v. Williams*, 737 F.2d 594, 602 (7th Cir. 1984), cert. denied, 470 U.S. 1003, 105 S.Ct. 1354, 84 L.Ed.2d 377 (1985). An affiant acts with "reckless disregard for the truth where he ' "in fact entertained serious doubts as to the truth of his" allegations." . . . Reckless disregard for the truth may also be proved inferentially 'from circumstances evincing "obvious reasons to doubt the veracity" of the allegations.' " *United States v. A Residence Located at 218 Third Street*, 805 F.2d 256, 258 (7th Cir. 1986). "Because states of mind must be proved circumstantially, a factfinder may infer reckless disregard from circumstances evincing 'obvious reasons to doubt the veracity' of the allegations." *Williams*, 737 F.2d at 602.

587 So.2d at 1275.

Fields testified that a couple of days before the May 29, 1991 search and seizure involved in this case, he had received a telephone call from Jones advising that he was "ready" to follow through on Fields' earlier request to him designed to "get him to drive down here with some cocaine." (C.T. 54, 56). Jones said that "he had it and he needed to get rid of it quick." (C.T. 56). They agreed to meet at the Quality Inn in Tuscaloosa and Fields rented two rooms there, one of which was number 151 (C.T. 57).

Although Fields rented those rooms at about one o'clock on the afternoon of the 29th, Jones didn't arrive until "about seven o'clock in the afternoon" (C.T. 58). Fields was not at the motel when Jones arrived, but was "out . . . I was somewhere else and I got a call that he was there and I came over." (C.T. 58). It was then that Fields asked Jones "did he have it" and Jones responded in the affirmative and advised him, as they were walking by Jones's car, that "it was right there under the speakers" in the back of the car. (C.T. 59). A second individual, known to Fields only as "Ricky," was with Jones (C.T. 60-61). When asked by Corzo's attorney how many times he had talked to Agent Johnson, Fields answered "I talked to him during the time that we was setting this thing up and that's when I talked to him. That was the only time." (C.T. 68). When the narcotics officers subsequently arrived at the motel, Fields was in his room there. (C.T. 61). When Johnson first arrived at the Quality Inn, he went to Room 153, accompanied by other agents. (C.T. 83). Subsequently, however, "I was in the room right beside 153, 151." (C.T. 91). Accordingly, Johnson and Fields had the opportunity to be together in Room 151 after the narcotics officers had arrived at the scene, but all of this would have been after Johnson had submitted his affidavit and secured the search warrant. "Prior to obtaining the search warrant, I did not go to the Quality Inn . . . It would have been in the neighborhood when I went to the Quality Inn of 10:15 to 10:20. As soon as he got to the Quality Inn, we executed the search warrant." (Johnson testimony, P. H. 98).

Accordingly, careful analysis must be made of Johnson's testimony concerning the various items of information he received from Fields, in order to determine what was received when, i.e. what and when was imparted over the telephone and what might have been imparted later, after Johnson had obtained the search warrant and arrived at the Quality Inn. Key testimony in that regard is found at pp. 87-90 of the preliminary hearing:

> Q. I have got a few questions for you, Paul. First of all, the purpose in you setting up this surveillance and making the subsequent search was based on information you received; is that correct?
>
> A. Yes, sir, and to confirm that information I did received to be factual.
>
> Q. Let me back you up a little bit. When did you receive this particular information?
>
> A. It would have been earlier, just prior to setting up the surveillance.
>
> Q. So would that be approximately six or seven o'clock in the evening on the 29th, on the same date?
>
> A. I would say in the general time frame of 7:15 to 7:30.
>
> Q. And did you receive that information *in person* or through a *phone call* or how?
>
> A. *The information was received by a phone call.*
>
> Q. All right. And if you would, relate to us as specifically as you can what you were told at that time.
>
> A. At that time, I was given a description of a vehicle, *a license plate number,* and a *description of*

two individuals that would be traveling in that vehicle.

Q. Okay. Were you given any names, any proper names of anybody that would be concerned with this vehicle?

A. Yes, sir, there was one name that I was.

Q. And who was that?

A. That was John Jones.

Q. As far as the other individual, do you recall what description you were given of him?

A. He was a heavier-set type fellow, wouldn't be classified as skinny whatsoever, little overweight, heavy-set individual, probably – description would be about 28, 30 years old. (Emphasis supplied)

. . .

Q. I was told that it was a Nissan, it was dark blue in color. I was given an Illinois license plate. Told it was a four door. Just a good general description of the vehicle.

Q. A four door, blue Nissan.

A. Dark blue.

Q. Dark blue, sorry. Let me clear up one thing. Were you given the fact that it had Illinois plates, or did they give you the specific plate number?

A. The specific plate number was given.

On the occasion of that same 7:15-7:30 p.m. telephone call, Johnson was told that there would be controlled substances in the vehicle and when asked if he received

"any specifics," including "where it would be located," he answered in the affirmative. When defense counsel attempted to question him further, the District Attorney objected successfully on the basis that such disclosure might reveal the identity of a confidential informant. However, defense counsel persisted and asked "Were you told where the controlled substance would be?" to which Agent Johnson answered "Yes." (P.H. 90-91). Subsequently, defense counsel asked Agent Johnson, "Based on this information when you received it, approximately 7:15 that evening, what did you do?" to which Agent Johnson answered that "At that point, I established the surveillance detail to surveil the general area of the Quality Inn." (P.H. 93-94).

Subsequently, apparently after Johnson had arrived at the motel and had an opportunity for personal conversation with Fields in Room 151, Fields told him about the possibility of the arrival of two more people who were involved with Jones. (P.H. 107-108). When asked by defense counsel "Did you have other conversations with him?" thereby referencing conversations other than the conversation wherein the information about the other individuals had been revealed, Agent Johnson answered "There had been other conversations previously." (P.H. 108). Agent Johnson had not received information from his informant concerning these other individuals at the time he obtained the search warrant. (P.H. 112). He did not even have that information after the arrest and seizure had been made of the occupants of Room 153. (P.H. 113). The information Johnson received from Fields concerning the fact that Jones had told Fields that two other

individuals had followed them down on the trip in question, came after the cocaine had been seized from Mr. Jones's vehicle. (C.T. 89-90). By the time a telephone call came in to Room 153 from one of those two additional individuals, Johnson "had also received information from an informant that another vehicle could be coming." (P.H. 113-114). This described sequence reinforces the inference that Johnson had further conversations with Fields after arriving at the motel. (See also P.H. 119-121).

The affidavit reflects that Johnson was sworn as to the same at 9:48 p.m. on May 29, 1991. He subsequently arrived at the Quality Inn at approximately 10:15 (P.H. 126).

Another question and answer indicating that there were at least two telephone calls to Johnson from Fields on the evening of the 29th prior to the time when Johnson gave his affidavit, is the question and answer appearing on page 131 of the preliminary hearing:

> Q. Okay. I believe you indicated that in the last phone call that you got from the confidential informant that you received a name and a physical description and the physical description fit somebody that you later determined to be Mr. McCraw?
>
> A. Yes.

Comparing and interrelating all of this information, the Court is persuaded that the preponderance of the evidence is to the effect the Johnson had more than one telephone conversation with Fields during the afternoon and night of May 29, 1991, and that at the time of the second or "last" of those telephone conversations, Fields

had met Jones at the motel, had observed the make, model, color, and tag number of his vehicle, and had observed "Ricky" to be accompanying him. This information was then imparted by Fields to Johnson over the telephone "in the general time frame of 7:15 to 7:30." (P.H. 87-89). Important in reconstructing these time sequences is the fact that Johnson testified that he received those particulars "just prior to setting up the surveillance," so it had to come from the informant rather than the officers who ultimately set up the surveillance. Throughout defense counsel's questioning of Johnson concerning this particular information, the assumption is made that it was derived from the informant (e.g., P.H. 92, line 22-23, p. 93, line 15-23). Agent Johnson stated at the conclusion of describing all of that particularized information that it was only after receiving it that he established the surveillance detail. (P.H. 94). The affidavit contains the particularized detail concerning the make, model, color, and license tag of Jones's vehicle, reflecting that said particularized information received from the informant had already been received as of the time of the applicant for the affidavit.

Accordingly, the Court does not agree with the interpretation of all of this testimony by defense counsel that Johnson received only one phone call from Fields prior to filing the affidavit and that such phone call preceded Jones's arrival in Tuscaloosa. As already acknowledged by defense counsel, there is neither evidence nor reasonable inferences therefrom which in any way contradict the proposition that Fields actually told Johnson that Fields had personally observed the cocaine inside Jones's vehicle. The Court now concludes that there is no proof,

direct and inferential, that Johnson acted with reckless disregard for the truth in including that information in his affidavit.

Franks contemplated that upon a defendant making a "substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit" (and the allegedly false statement being necessary to a finding of probable cause) a hearing would be held at the defendant's request to address the issue of the affiant's perjury or reckless disregard. It is defense counsels' view, as stated at the bottom of page 2 of their said memorandum, that "the hearing has been provided by the Honorable Court, that hearing having been accomplished by stipulating into evidence the previous testimony of Agent Paul Johnson as well as that of the confidential informant, Bobby Fields." Perhaps that is putting the cart before the horse procedurally, insofar as the sequence prescribed by *Franks*, but the defendant still bears the burden of establishing by a preponderance of the evidence that false statements were knowingly included in the affidavit, or included within it "with a reckless disregard for the truth." The Court does not find that a preponderance of the evidence leads to that conclusion, but rather, at the very least, the evidence is equally compatible with the scenario that Fields told Johnson he had seen the cocaine in the car. As another alternative to the respective scenarios of Fields lying to Johnson about having seen the cocaine, or Johnson lying in his affidavit about having been told that by Fields, the Court can easily envision that a telephone call made by Fields to Johnson after Jones had shown his car to Fields and had

told Fields about the cocaine being in it under the speakers, might have included some exchange such as "He's got the cocaine hidden in his car," "Have you seen it?" "Yes, I just saw it." In that type of situation, there may have been a miscommunication or a misapprehension, but that would constitute only negligence, which is permissible under *Franks*.

Accordingly, the motion to suppress is denied.

This the 26th day of October, 1993.

/s/ Robert B. Harwood, Jr.
Robert B. Harwood, Jr.
Circuit Judge

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